

ATTACHMENT A

BellSouth Telecommunications, Inc.
d/b/a AT&T North Carolina,

Plaintiff,

V.

Edward S. Finley, Jr., Chairman,
Lorinzo L. Joyner, Commissioner, and
William T. Culpepper, III, Commissioner,
in their official capacities and not as individuals,

and

Intrado Communications Inc.,

Defendants.

Case No. 5:09-cv-00517-BR

Judge W. Earl Britt

**AT&T NORTH CAROLINA'S REPLY IN SUPPORT OF ITS
MOTION FOR SUMMARY JUDGMENT**

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INTRODUCTION

The North Carolina Utility Commission (“NCUC”) and Intrado Communications Inc.’s (“Intrado”) Response briefs, like their Initial briefs, fail to explain how the NCUC’s decision is in any way consistent with federal law or supported by the evidence. They ignore and misconstrue the relevant federal law, including the Federal Communications Commission’s (“FCC’s”) definition of intercommunication. They also ignore the actual grounds for the NCUC’s decision and fail to cite anything in the record to support it. Because the NCUC’s decision is inconsistent with federal law and unsupported by the facts, it should be reversed.

ARGUMENT

I. The NCUC’s Decision Is Not Entitled To Deference

Intrado claims that the NCUC’s ruling that Intrado’s service qualifies as “telephone exchange service” is entitled to deference because it concerns a mixed question of law and fact. Intrado Resp. at 3. That is incorrect. As the NCUC stated, there is “no substantial difference among the parties” about the facts, *i.e.*, about what Intrado’s service can and cannot do. AT&T Br., Att. 1 (RAO) at 9. All agree that Intrado’s service enables its customers, which are Public Safety Answering Points (“PSAPs”), to receive 911 calls originated by callers using another carrier’s service and, if necessary, to transfer those calls to the correct PSAP. But the question here is whether, as a *legal* matter, a service with those limited capabilities qualifies as “telephone exchange service” under 47 U.S.C. § 153(47). *Id.* (“Where the parties differ is the legal significance of these services” *i.e.*, whether they qualify as “telephone exchange service” under federal law). The NCUC’s rulings the proper interpretation of federal law are not entitled to any deference. *BellSouth Telecomms., Inc. v. Sanford*, 494 F.3d 439, 447 (4th Cir. 2007).

In any event, Intrado and the NCUC point to nothing in the record below that would support the NCUC’s legal conclusions. Intrado asserts (Resp. at 8) that there was an “extensive

record” and “testimony” by its witnesses that describe Intrado’s service, but these claims are either followed by no record cite at all, a cite that is irrelevant, or a cite that does not support its position in any way. For example, Intrado (Resp. at n.16) points to excerpts of the direct testimony of Ms. Spence-Lenss, but the only thing it says about the technical aspects of Intrado’s service is that it will enable subscribers to “accept, route, transmit, transport, and/or aggregate 911 calls” – it says nothing about intercommunication or call origination, which are necessary components of a “telephone exchange service.” Tr. Vol. 1 at 23 (Record Index 39). Ms. Spence-Lenss’s rebuttal testimony is no different. *Id.* at 37.¹ The NCUC likewise fails to cite any record evidence that supports its approach to what qualifies as “telephone exchange service.” That is because there is not even a scintilla of evidence, much less substantial evidence, to support the NCUC’s interpretation, which makes the decision arbitrary and capricious as well as contrary to law.² All the evidence (including Intrado’s tariff and its witnesses’ testimony) shows that Intrado’s service does not allow its PSAP subscribers to make calls. AT&T Br. at 11-18, Resp. Br. at 5-18 (both giving specific record citations). Intrado’s service at most allows its PSAP customers to transfer calls made by others, not to originate calls on their own, much less to make calls to everyone in the “community of interest” (both of which are necessary components of “intercommunication”). AT&T Br. at 11-18, Resp. Br. at 5-18 (giving specific record citations).

In addition to seeking deference where none is due, Intrado tries to run from the facts, arguing that AT&T’s reliance on Intrado’s Florida and Ohio tariffs as accurately describing Intrado’s planned service in North Carolina is supported only by AT&T’s “self-service”

¹ In rebuttal, Ms. Spence Lenss made one vague reference to “originating a call in a conferencing capacity,” but Intrado does not rely on that testimony in its response brief, likely because she clarified during cross examination (Tr. Vol. 1 at 59-62, Record Index No. 39) that this was *not* the origination of a second call. That clarification is consistent with all the rest of the record evidence. AT&T Resp. Br. at 9-10.

² *Smithfield Packing Co. v. NLRB*, 510 F.3d 507, 516 & n.7 (4th Cir. 2007); *Coronet Foods, Inc. v. NLRB*, 158 F.3d 782, 789 (4th Cir. 1998).

statements. Intrado Resp. at 9. That is false. Intrado's own witness admitted that Intrado's Florida tariff "contains the telephone exchange services Intrado Comm plans to provide to PSAPs and other governmental entities" in North Carolina. Tr. Vol. 1 at 34 (Record Index No. 39). Intrado also repeatedly relied on the Ohio commission's decision that Intrado's tariffed service in Ohio qualifies as "telephone exchange service."³ That can only mean that Intrado agrees that its Ohio tariff (which is essentially identical to the Florida tariff) also accurately reflects its service in North Carolina. Indeed, if the Ohio tariff does not accurately reflect Intrado's service in North Carolina, then the Ohio decision based on that tariff is also irrelevant, and the NCUC's reliance on the Ohio decision as the main basis for its decision (*see* AT&T Br., Att. 1 (RAO at 13)) was arbitrary and capricious. Moreover, despite its objections, Intrado does not point to (and has never pointed to) a single instance where its Florida or Ohio tariffs incorrectly describe its service in North Carolina or where AT&T has mischaracterized those tariffs. Nor could it: AT&T's discussion of Intrado's tariffs quotes directly from those tariffs and relies on the plain meaning of the tariffs. AT&T Br. at 11-18; AT&T Reply at 5-18.

II. Intrado's Service Is Not A "Telephone Exchange Service"

A. Intrado's Service Does Not Allow Intrado's Subscribers to Originate Calls

In order to qualify as "telephone exchange service," Intrado's service must enable Intrado's PSAP subscribers to originate calls. The NCUC's sole basis for finding that Intrado provides call origination was the Ohio commission's finding that using the "hookflash" feature was the same as call origination. AT&T Br., Att. 1 (RAO at 13). Intrado's witness, however, testified that hookflash is *not* the same as originating a call. Tr. Vol. 1 at 58-62 (Record Index No. 39). Intrado's tariff likewise describes hookflash ("Call Transfer or Call Bridging") *not* as

³ See Intrado's initial and reply comments to the NCUC (Record Index Nos. 60 and 65).

the origination of a new, second call, but as “adding” an “additional party” to an “existing call,” and as the “*transfer* [of] an *incoming 911 call*” “*to a secondary destination*,” *i.e.*, another PSAP. AT&T Resp. at 6-7 (quoting tariffs; emphasis added). In addition, Intrado’s tariffs explicitly state that Intrado “is not responsible for the provision of local exchange service to its Customers,” that its service “is not intended to replace the local telephone service of the various public safety agencies which may participate in the use of this service,” and that the PSAP customer must agree to place *all outgoing calls* using service provided by another carrier. AT&T Br. at 7-14, Resp. at 3-12 Intrado’s tariff (and its witnesses testimony¹) makes clear that Intrado’s service only permits PSAPs to *receive* and *transfer* incoming 911 calls – not make calls or engage in “intercommunication.” *Id.*

Intrado largely ignores the call-origination requirement, arguing only that its service allows a PSAP to “initiate a communication to another PSAP.” Intrado Resp. at 22. But the issue is whether Intrado’s service lets a PSAP “initiate” a *new call*, and it does not. The PSAP cannot do anything until it first receives an incoming 911 call. Then, if (and only if) Intrado’s PSAP customer is not the correct PSAP to handle the emergency call given the 911 caller’s location, Intrado’s PSAP customer can “hookflash” (*transfer*) that misdirected call to the appropriate PSAP. AT&T Resp. at 6-7. Transferring a misdirected call is not the same as originating a new, separate call.

Alternatively, Intrado now claims – for the first time – that it does not have to meet the call-origination requirement at all. Rather, Intrado contends that the call-origination requirement applies only under part B of the definition of “telephone exchange service,” and that it can satisfy part A of the definition without providing the ability to originate a call. Intrado Resp. at 7. Intrado’s new theory rests on the claim that the “intercommunication” requirement does not

include a call-origination component, and that the FCC's *Directory Listing Order* found that directory assistance ("DA") with call completion was "telephone exchange service" without finding that it included call-origination capability. *Id.* Intrado is wrong on both counts.

First, Intrado's theory could only work if one viewed part B of the definition of "telephone exchange service" as establishing a different, stricter definition of "telephone exchange service" than part A, in that part B would require that a service include both the ability to intercommunicate and originate calls, whereas under part A a service would only have to provide the ability to intercommunicate (which, according to Intrado, does not include a call-origination component). That interpretation makes no sense, particularly when part B expressly says that services meeting part B must be "comparable to" those meeting part A. Part B was not added to create a new, more difficult test for defining the same category of service.⁴

Second, "intercommunication" is a requirement under both part A and part B, *Advanced Services Order*, ¶ 30; AT&T Br., Att. 1 (RAO at 11), and the FCC defines an "intercommunicating" service as one that allows subscribers to "make calls" to "all subscribers" in an area. *Advanced Services Order*, ¶¶ 20, 23, 24, 25, n.61⁵; *Directory Listing Order*, ¶¶ 17, 21-22. The ability to "make calls" necessarily means the ability to *originate* a call, so call-origination capability is required under both part A and part B. AT&T Br., Att. 4, *Florida Order*, 2008 WL 5381647, at 5. Indeed, the NCUC itself viewed call origination as an inherent part of the intercommunication requirement, stating that the intercommunication requirement, which is express in part A, is also implicitly included in part B as a result of part B's reference to

⁴ Part B was added only to "ensure that the definition of telephone exchange service was not limited to traditional voice telephony, but also included non-traditional means of communications within a local calling area," like DSL service. *Provision of Directory Listing Information Under the Telecommunications Act of 1934, as Amended*, 16 FCC Rcd. 2736, at ¶ 21 (2001) ("*Directory Listing Order*").

⁵ *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 15 FCC Rcd. 385 (1999) ("*Advanced Services Order*").

the ability to “originate and terminate” a call. AT&T Br., Att. 1 (RAO at 11).

Third, contrary to Intrado’s claims, the FCC *did* find in the *Directory Listing Order* that DA with call completion included the ability of a subscriber to originate calls and made clear that call-origination capability is part of “intercommunication.” The FCC explained that DA with call completion met both part A and part B of the definition because it allowed a subscriber to “make calls,” *i.e.*, “to originate” calls. *Directory Listing Order*, ¶¶ 16-17, 20-21. Specifically, when examining the intercommunication requirement under part A, the FCC stated that DA with call completion “constitutes intercommunication because it permits a community of interconnected customers to *make calls* to one another,” and similarly stated that the service meets part B because it permits “a community of interconnected customers to *make calls* to one another.” *Id.*, ¶¶ 17, 21. The “make calls” requirement is part of the intercommunication requirement, which applies under both part A and part B, and the *Directory Listing Order* drew no distinction between “mak[ing] calls” and “originat[ing]” calls. The *Directory Listing Order* therefore does not support Intrado’s new theory that something can be “telephone exchange service” even when it does not provide call-origination capability.

B. Intrado’s Service Does Not Provide Intercommunication

No one disputes that both parts A and B of the definition of “telephone exchange service” require that the service provide “intercommunication.” In order to provide “intercommunication,” Intrado’s service must not only allow its subscriber (the PSAP) to originate calls (as discussed above), but also to make those calls to “all” (*i.e.*, “any”) other members of the “community of interest.” AT&T Br. at 14-18, Resp. Br. at 12-18. Intrado claims (Resp. at 13) that its service meets this test because *911 callers* can reach Intrado’s PSAP customers and talk to them. But that is the wrong perspective. The relevant legal question is whether the *subscriber* to *Intrado’s service* can make calls to all others in the “community of

interest.” The only subscribers to Intrado’s service are PSAPs, and those PSAPs cannot make calls to 911 callers (or anyone else). All they can do is transfer an incoming 911 call to another PSAP. AT&T Resp. at 16-17 (quoting Intrado tariffs and testimony). Thus, if 911 callers are part of the “community of interest” (as Intrado claims and the NCUC found, AT&T Br., Att. 1 (RAO at 13)), then Intrado’s service does not provide intercommunication, because it does not allow the PSAP subscribers to “make calls” to 911 callers.⁶

Intrado tries, for the first time, to compare its service to the DSL services described in the FCC’s *Advanced Services Order* and to distinguish its service from “private line” service. Intrado Resp. at 15-16. That argument fails. The FCC explained that DSL services meet the definition of “telephone exchange service” because “a customer may rearrange the service to communicate with *any other subscriber* located on that network.” *Advanced Services Order*, ¶¶ 24-25. Intrado’s PSAP customers cannot do that, as shown above. On the other hand, private line services do not qualify as “telephone exchange service” because “customers subscribing to private line service . . . may communicate only between those specific, predetermined points set aside for that customer’s exclusive use.” *Id.*, ¶ 26 (emphasis added). That is just like Intrado’s service to PSAPs, which only allows the PSAPs to connect with a “specific, predetermined point[],” namely the PSAP assigned to the 911 caller’s location.⁷

Intrado also tries, again for the first time, to compare its service to the DA with call

⁶ AT&T Br., Att. 3, *Illinois Order*, *10-15.

⁷ Intrado also claims (Resp. at 16) that 911 callers can “intercommunicate” simply by dialing 911, but that reconfiguring the DSL service will take “seven minutes” and is “awkward.” While relative ease has nothing to do with the definition of “telephone exchange service,” there is nothing in the record to support Intrado’s claim that it is difficult for DSL subscribers to intercommunicate, and the FCC did not see it that way, instead stating that the DSL customer can intercommunicate “with relative ease.” *Advanced Services Order*, ¶ 25. Moreover, Intrado’s argument again looks at what the 911 caller does with service provided by another carrier, not what its PSAP subscriber can do. Intrado further claims that its services provides a “second dimension of intercommunication the neither DSL service nor DA service have.” Again, Intrado is pretending that the 911 caller is the subscriber to its service. The only “dimension” to Intrado’s service is a call transfer to a predetermined point (another PSAP), which is not “intercommunication.”

completion service addressed in the FCC's *Directory Listing Order*, asserting that its service is like DA with call completion because "it permits the completion of calls initiated by the calling party to the person or entity selected by the calling party, which in the instant case is the correct PSAP." Resp. at 13. There are two significant errors in that analogy.

First, with regard to DA with call completion, the "calling parties," *i.e.*, 411 callers, are actually using the service of the DA with call completion provider, either by directly subscribing to it or because it is part of their local exchange service. *Directory Listing Order* ¶ 2. People calling 911, by contrast, are not subscribers to Intrado's service, and therefore are not using Intrado's service.

Second, whereas a provider of DA with call completion initiates a second call on behalf of the caller to reach any number the caller picks (*i.e.*, it includes call origination for the calling party), Intrado's service merely transfers a misdirected 911 call to the correct PSAP (*i.e.*, the PSAP covering the geographic area where the 911 caller is located). The 911 caller does not use Intrado's service to "select" a new destination for the call. As the FCC explained, DA with call completion provides number look-up *and then* allows the subscriber to originate and terminate a call to any requested number. *Directory Listing Order*, ¶ 18. In other words, there are two distinct calls with two different purposes: the 411 call (with the purpose of obtaining a telephone number) and the call to the 10 digit number on the public telephone network (with an entirely different purpose). The DA provider – not the 411 caller's local exchange service provider – originates the call to the 10-digit number requested by the 411 caller. In contrast, Intrado's service (as its tariff makes clear) just "transfer[s]" the "existing call" (*i.e.*, the "incoming 9-1-1 call") to a "secondary destination," *i.e.*, the appropriate PSAP, with the same purpose in mind, *i.e.*, to handle the 911 caller's emergency. AT&T Br. at 11-14, Resp. at 7. There is one call with

one purpose.

The Illinois commission recognized this distinction and explained that, unlike in the 411 context, in the 911 context the “Intrado-served PSAP (or any other PSAP) could not originate a new communication with a party of the 911 caller’s choice for a purpose unrelated to the emergency at hand.” AT&T Br., Att. 3, *Illinois Order*, *9. “The PSAP can only transfer the call, without terminating it, to a single authorized respondent, and may continue to participate in the call. That is not like DA call completion, *which originates a new call to the end-user’s selected destination* somewhere in the exchange area, without further involvement by the DA provider (who may provision number look-up and call completion without live human participation).” *Id.*; *see also id.*, *12 (“In the DA context, after the caller obtains information from the DA provider, s/he can elect to communicate with a large and diverse number of other telecommunications customers connected to the [public telephone network] in the exchange area . . . for purposes entirely different than the purpose of the initial call to the DA provider (i.e., to obtain a telephone number). In contrast, Intrado’s 911 service permits no more than a transfer to another PSAP for further (and joint) handling of the original purpose of the call.”).

If anything, Intrado’s service is more like DA *without* call completion, which the FCC held does not meet the definition of “telephone exchange service” (*Directory Listing Order*, ¶ 22): the subscriber to DA without call completion (*i.e.*, the 411 caller) can only call a single designated point (*i.e.*, the directory assistance operator); likewise the PSAP subscriber can only “call” (though it is actually just a transfer, not a call) a single designated point (*i.e.*, the PSAP assigned to the 911 callers location). Moreover, even where the DA *without* call completion provider “hand[s] the call off to another carrier to complete” – which is much like Intrado’s PSAP customer handing off the 911 call to the appropriate PSAP to handle the call – the

definition of “telephone exchange service” is not met. *Id.*

C. The Exchange Area Requirements Are Not Met

The NCUC and Intrado’s arguments relating to this requirement were addressed in AT&T’s prior briefs. AT&T Br. at 18-19, Resp. Br. at 18-19. The only new argument Intrado raises – one it never raised before and that the NCUC did not rely upon – is the argument that any service that is not a toll service must be a telephone exchange service. There is nothing to support that claim. If it were true, the FCC would have said so, rather than having a specific definition of telephone exchange service, requiring evaluation of many components.

III. AT&T’s 911 Service Is Irrelevant

A primary basis for the NCUC’s decision was its theory that Intrado’s service is like AT&T’s 911 service. As AT&T has shown, that rationale is baseless because no regulator has ever found that AT&T’s 911 service qualifies as “telephone exchange service” under federal law. In response, Intrado and the NCUC backtrack from their previous arguments, claiming that the purported comparison between AT&T’s 911 service and Intrado’s service did not really have an effect on the NCUC’s decision. That is not true. The *only* argument Intrado’s witness Ms. Spence-Lenss made in her direct testimony to support Intrado’s claim that its service meets the definition of “telephone exchange service” was that the service was like AT&T’s 911 service. Tr. Vol. I at 13 (Record Index 39). The RAO (at 13) relied heavily on that erroneous comparison.

For all of these reasons, the NCUC’s decision is unlawful and arbitrary and capricious and should be reversed and vacated.

This 28th day of June, 2010.

Respectfully submitted,

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This 28th day of June, 2010.

/s/ Eric H. Cottrell
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